Central Law Journal.

ST. LOUIS, MO., OCTOBER 20, 1905.

ARE THERE BREACHES OF CONTRACTS WHICH WOULD JUSTIFY PARTIES IN REGARDING THEM AS RESCINDED WHICH AT THE SAME TIME WOULD NOT JUSTIFY THE RIGHT TO REGARD THEM AS WHOLLY ABANDONED.

While we have found no case where the point has been directly in issue, we have frequently heard lawyers assert the affirmative of the above proposition and found such intimation in the case of Palm v. Ohio & M. R. Co., 18 Ill. 217. The court said: "In this case we have a contract for the manufacture and delivery of sixteen engines, each to be paid for upon delivery, without any expression or intimation that the parties expected any extraordinary consequences were to follow if the money was not paid when due. All that the contract provides is that so much money and so much in bonds shall become due upon delivery of each engine. By its terms it simply gives the party a cause of action for that amount. The contract provides for no other penalty or liability, and the law imposes no other, except, perhaps, that this violation of the contract by the defendant in failing to make the payment may justify the plaintiffs in treating the contract as rescinded." We presume that because there are so many cases arising where the mere right to rescind has been exercised, without taking the question of damages into consideration, that the impression has gotten abroad that in such cases there was merely the right to rescind under such conditions without taking into consideration that rescission could take place only when the acts of one of the parties might be regarded as a total failure. That is to say, it would be a question to determine from all the evidence, whether one of the parties had evinced an intention not to be further bound by the terms of the contract. There is therefore no case where a person would have a right to regard a breach of a contract for the purpose of merely rescinding, where he would not, if necessary, have had the right to sue for damages.

The manner of stating the rule by Lord Selburn, we greatly commend because of its conciseness and at the same time its comprehensiveness and conclusiveness. He said in the case of Mersey Steel & Iron Co. v. Naylor, 9 App. Cases, 438: "You must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation,—to an absolute refusal to perform the contract,—such as would amount to a rescission, if he had power to rescind, and whether the other party may accept it as a reason for not performing his part." In the case of Johnstone v. Milling, 16 L. R. (Q. B. D.) 467, it is held that where one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation." The question of course would be one of fact as to which was the one really in fault. But it is to be observed that in the above cases there is left no room for doubt, but that before the right to rescind arises there must be a complete renunciation of the contract, such as would amount to a rescission if one party could rescind by himself, which of course means there must be a total failure. As was said in the case of Freeth v. Burr, L. R. 9 C. P. 208: "Where the question is whether one party to a contract is set free by the acts of the other, the real matter for consideration is whether the acts and conduct of the one do or do not amount to an intimation of an intention to

abandon and altogether refuse performance of the contract."

The above mentioned English cases have been fully approved in the United States in Norrington v. Wright, 115 U. S. 210, and Dingley v. Oler, 115 U. S. 490, and many states. It is safe to conclude that there is no case where the right to rescind arises where, if it is necessary, the injured party might not at the same time sue as for a total failure and recover such damages as might be shown.

NOTES OF IMPORTANT DECISIONS.

USURY—WHAT DOES NOT CONSTITUTE.—The case of Lusk v. Smith, 81 Pac. Rep. 173, recently decided by the Supreme Court of Kansas, presents an interesting question relating to usury. In that case a son receiving $5,000 from his mother, stated to her that he could get her 10 per cent interest, and perhaps more. He deposited the amount to his credit in a bank "as agent," and withdrew it on checks signed the same way. He gave his mother a memorandum book, in which he credited her with the principal sum, adding the words, "to be loaned out." The court said:

"It is an essential requisite to a usurious transaction that there be a loan, either express or implied. Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Williams v. Reynolds & Smith, 10 Md. 57; Perley's Law of Interest, p. 201. As against the presumption of a usurious agreement arising from the payment of an amount above the legal rate of interest for a number of years are the express words of the deceased, who received the money, at the time he received it, acquiesced in by his mother, to the effect that he could get her 10 per cent interest, and perhaps more. This declaration was followed by a deposit of the amount to his credit in the bank, 'as agent,' and its withdrawal from the bank by checks signed by him in the same way. Shortly before his death he asserted that the principal sum had not been impaired. The entries made by him in the passbook, crediting his mother with $5,000 'to be loaned out,' is strong corroborative evidence that he acted in the capacity of her agent and was not a borrower. The payment to her of $50 a month would carry with it a stronger presumption of a usurious transaction if the parties did not sustain the relation of a widowed mother and son. The facts proved, considering the relationship of the parties, lead to the conclusion that the payment of usurious interest for more than ten years by the son to his mother was not made in compliance with a contract in which she exacted the rate received. Where an agreement to pay interest is subject to two constructions, one which would make it usurious and the other not, the court will adopt the latter. Succession of Bushrod Jenkins, 5 La. Ann. 682. The burden is upon the party seeking to impeach the transaction to show guilty intent, and that the contract was a cover for usury. Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583; Brolasky v. Miller, 8 N. J. Eq. 789. The case of Rosenstein v. Fox, 150 N. Y. 354, 44 N. E. Rep. 1027, is a pertinent authority. It was said: 'Usury, as a defense to an action upon a promissory note given for a loan of money, is not made out by testimony of the defendant to the effect that upon several occasions after the loan was made he paid the holder of the note more than was due at that time for legal interest, without proof of any usurious agreement between the parties by which the defendant was to pay more than the legal interest for the money loaned.' In a late case decided by the Supreme Court of New York, Bosworth v. Kinghorn, 87 N. Y. Supp. 983, 984, 985: 'The evidence shows that both the notes sued on were given for loans of money, but there is an entire failure of proof that, at the time the loans were made or the notes given, any agreement whatever was entered into for taking or giving of interest in excess of the legal rate. It is conceded that moneys were paid to the plaintiff, as and for interest, amounting to ten and one-half per cent per annum; and, as to each note it would appear, from indorsements, for some years interest was paid at regular intervals of six months, from which it is argued that an inference may be drawn that that was the rate of interest contemplated by the parties at the time the moneys were loaned and the notes given. But that inference is not admissible in this case. Where there is evidence establishing that the lender has demanded interest in excess of the legal rate, and the borrower has complied with the demand, there is something from which an inference can be drawn that performance was made of an original contract, and in accordance with its terms. Such is the case of Smith v. Hathorn, 88 N. Y. 211; but here the payments of interest in excess of the legal rate may have been, and the proof justifies the conclusion that they were, in the nature of gratuities voluntarily made by the debtors, and for the purpose of equalizing payments made to relatives of members of the firm in transactions of some character had with them, and without either solicitation or demand of the payees, as holders of the notes in suit. The evidence is altogether insufficient to sustain the defense of usury, and, as the trial justice points out, "the facts established warrant the application of the rules recognized" in Rosenstein v. Fox, 150 N. Y. 363, 44 N. E. Rep. 1027, and White v. Benjamin, 138 N. Y. 623, 33 N. E. Rep. 1037. * * * The cases in which usurious interest has been credited on account of the principal sum are those in which usury, involving the element of intent, was fairly made to appear. The taint must be in the agreement.' This case was affirmed by the court of appeals. 72 N. E. Rep. 1139."

In the case of the United States Mfg. Co. v.

Sperry, 138 U. S. 313, 11 Sup. Ct. Rep. 321, one of the objects for which the loan was secured was to pay arrears of interest on previous loans between the same parties, and the lender retained out of the latter loan not only the interest due on the former ones, but interest on overdue coupons evidencing interest on former loans, both parties supposing that the coupons bore interest. The court held that such coupons did not bear interest. The court held that though the amount retained was in excess of the highest rate of interest allowed by the law on the original loans, this did not make the latter loan usurious, as there was no contract to pay such excessive rate.

In Iowa, the supreme court held, in the case of Bush v. Peterson, 54 Iowa, 243, 6 N. W. Rep. 287, that "an indorsement signed by the person to whom the money is to be paid agreeing to accept interest in excess of the legal rate but not binding the promisor to pay such excess, does not of itself establish usury."

In Westerfield v. Breed, 26 N. J. Eq. 357, it is held that there can be no usury without a contract.

In New York an intention to commit usury will not avoid a contract, unless the loan actually made is accompanied by a corrupt agreement to take more than legal rate of interest. Bank of Monroe v. Strong, 1 Clark Ch. 76; Pomeroy v. Ainsworth, 22 Barb. 118; Home Ins. Co. v. Dunham, 33 Hun, 415.

In North Carolina it is held that where there is an intent on the part of the lender to obtain something more than a lawful rate it is usurious if the contract is such that he may do so. Miller v. Life Ins. Co. of Va., 118 N. Car. 612, 24 S. E. Rep. 484, 54 Am. St. Rep. 741.

No judgment can be rendered in Ohio which includes usury. Parvin v. McBride, 1 Diase, 566. See Balfour v. Davis, 14 Oreg. 47, 12 Pac. Rep. 89.

In Pennsylvania, it is held in Philadelphia v. Kelly, 166 Pa. 207, that where a loan is made for an indefinite period, the mere fact that the money to be paid for the loan exceeds 6 per cent per annum, the lawful rate, does not render the transaction usurious.

In Vermont it has been held that to avoid a note for usury it must be proved that a usurious agreement was made between the parties at the time when the money for which the note was executed was loaned. Hammond's Admr. v. Smith, 17 Vt. 231.

EVIDENCE—ORAL AGREEMENT TO INDEMNIFY NOT WITHIN THE STATUTE OF FRAUDS, AS A GENERAL RULE.—The case of Peterson v. Creason, recently decided by the Supreme Court of Oregon, 81 Pac. Rep. 574, presents a question upon which there has been much controversy and is interesting. The facts are as follows:

In April, 1894, Edward, George, and Rose Bushey were the joint owners of a large tract of land near the city of Roseburg, which was mortgaged to David Grenot for about $7,000. The Busheys desired to lay off a part of the land into town lots for sale. Grenot objected on the theory that he would thereby lose from the lien of his mortgage the land covered by the proposed streets and alleys. In order to satisfy him and obtain his consent to the platting of the property, about ten acres of the platted portion was not subdivided into lots, but was marked on the recorded plat or map as "Reserved," it being understood orally between the Busheys and Grenot that the land so marked should be reserved as additional security to Grenot. Soon after the laying off of the property, judgments were obtained against the Busheys by Thompson and Josephson for about $900, and they were duly docketed. Thereafter, and in August, 1896, the plaintiff purchased about three acres of the land marked "Reserved" on the map or plat for $1,000. The negotiations for the purchase were had with Grenot and Buick, agent for the Busheys. Grenot agreed, in consideration of the paying to him of the purchase price, to release the property from the lien of his mortgage, and to indemnify and save harmless the plaintiff from the lien of the Thompson and Josephson judgments. The plaintiff, relying upon this agreement and promise of Grenot, accepted the deed from the Busheys, and paid to Grenot the entire purchase price, and Grenot released his mortgage as stipulated, but failed and neglected to protect the plaintiff from the judgment liens, and on account thereof he was compelled to and did pay, in November, 1899, $900, in order to protect his title. Grenot died, leaving a large amount of property, which descended to the defendant, and on account thereof this suit is prosecuted against her on the indemnity contract. The defendant had a decree in the court below, and the plaintiff appeals. The court said:

"Whether a contract between two persons, whereby one agees to protect or save harmless the other against liability to or the claim of some other person is within the statute of frauds, and void unless in writing, has been the subject of much discussion by the courts and text-writers since the cases of Thomas v. Cook, 8 B. & C. 728, and Green v. Cresswell, 10 Adolph & E. 153. The able and exhaustive opinion of Mr. Justice Wolverton on this question in Rose v. Wollenberg, 31 Oreg. 269, 44 Pac. Rep. 382, 39 L. R. A. 378, 65 Am. St. Rep. 826, renders unnecessary its further examination at this time. It is sufficient for the present purposes, as he points out, that where the promisor has a 'personal, immediate, or pecuniary' interest in the transaction, and the inducement for his promise is a benefit to him, the contract is not within the statute, and the courts will give effect to the promise, although not in writing. In such case the contract is an original, and not a collateral, undertaking. It is not the promise of one person to answer for the default or miscarriage of another, but is, in substance, the original contract of the promisor. 16 Am. & Eng. Ency. Law (2d Ed.), 169; Davis v. Patrick, 141 U. S. 479, 7 Sup. Ct. Rep. 1102, 30

L. Ed. 1090; Kutzmeyer v. Ennis, 27 N. J. Law, 371; and the authorities cited in Rose v. Wollenberg, *supra*. The agreement was not, however, to warrant and defend the title to the land purchased by the plaintiff, nor was it to pay or discharge the judgment liens. But it was to indemnify and save plaintiff harmless from any injury or damage he might suffer by reason of such liens. The cause of action on the contract therefore did not accrue at once, and could not until plaintiff was in some way injured by its breach. This did not occur until he was entitled to bring and prosecute an action thereon, and that was only when he was compelled to pay the lien to save his property (Rowsey v. Lynch, 61 Mo. 560), and is therefore not barred by the statute of limitations."

The leading English case supporting the opinion of the principal case is Thomas v. Cook, 8 Barn. & C. 728, 3 Moody & R. 444, which was afterwards rejected in Green v. Cresswell, 10 Ad. & El. 453, but finally established in the case of Reader v. Kingham, 13 C. B. N. S. 344. See 39 L. R. A. 378, note, which says that case has been followed by the great majority of cases in England and the United States ever since, though the reasons for the adoption of such rule have not always been the same. Upon the proposition that such a promise is not within the statute of frauds, see Apgar v. Hiler, 24 N. J. Law, 812; Ferrell v. Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393; Barry v. Ranson, 12 N. Y. 462; Hogg v. Thomas, 35 La. Ann. 298; Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Horn v. Bray, 51 Ind. 55, 19 Am. Rep. 743; Potter v. Brown, 35 Mich. 274; Blake v. Cole, 22 Pick. 97; Oldham v. Broom, 28 Ohio St. 41; Phillips v. Preston, 45 U. S. (5 How.) 278, 12 L. Ed. 152; Sanders v. Gillespie, 59 N. Y. 558; Westfall v. Parsons, 16 Barb. 648; Harrison v. Sawtell, 10 Johns. 242, 6 Am. Dec. 337; Cortelyou v. Hoagland, 40 N. J. Eq. 1; McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274; Baker v. Dillman, 12 Abb. Pr. 313; Hockaday v. Parker, 8 Jones L. 16; Dorwin v. Smith, 35 Vt. 69; Spear v. Farmers' & M. Bank, 156 Ill. 559; Jones v. Letcher, 13 B. Mon. 363. The contrary doctrine has been held in Missouri. Bissig v. Briton, 59 Mo. 204, 21 Am. Rep. 379, and in Virginia, Wolverton v. Davis, 85 Va. 64.

A PERSON WHO SIGNS A NEGOTIABLE INSTRUMENT IN BLANK BEFORE DELIVERY IS LIABLE AS AN INDORSER. — In the case of Thorp v. White, 74 N. E. Rep. 592, the facts were as follows: The defendant Hannah C. Hand irregularly became a party to the promissory note set forth in the bill of complaint, as before delivery she signed her name in blank on the back of an instrument of which the defendant White was the maker, and the plaintiff the payee. Dubois v. Mason, 127 Mass. 37, 38, 34 Am. Rep. 335. According to the law relating to negotiable promissory notes before St. 1898, p. 502, ch. 533, § 64, cl. 1, took effect, she was liable as a promisor between hereself and the plaintiff, though entitled to notice as if she were an indorser when the note was not paid at maturity by the maker. Fay v. Smith, 1 Allen, 477, 478, 79 Am. Dec. 752; Brooks v. Stackpole, 168 Mass. 537, 47 N. E. Rep. 419; Black v. Ridgway, 131 Mass. 77, 84. But after the negotiable instruments act became operative this distinction was abolished, and the effect of her signature was to make her an indorser as to all parties. Rev. Laws, ch. 73, § 81.

After she had signed and given the note to White, he wrote in the body of it, without her knowledge and consent, the words, "with the privilege of renewal for one year from April 30, 1904," and then delivered it to the plaintiff, who took it without knowing of this change. If such an alteration had been made by the plaintiff after delivery, and it was found to have been material, the defendant would have been relieved from performance of her promise. But if deemed immaterial, she would have been held liable. Lee v. Butler, 167 Mass. 426, 430, 46 N. E. Rep. 52, 57 Am. St. Rep. 466; Gaylord v. Pelland, 169 Mass. 356, 360, 47 N. E. Rep. 1019; Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N. E. Rep. 49; James v. Tilton, 183 Mass. 275, 67 N. E. Rep. 326. It, however, becomes unnecessary to decide whether this rule should be applied where the change was made under the conditions previously stated, for either way the defendant was not discharged. See Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92. The note was put in circulation as a contract on delivery to the payee, who, upon acquiring title by its negotiation, thus regularly became a holder of it within the provisions of Rev. Laws, ch. 73, §69. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 144, 66 N. E. Rep. 646, 97 Am. St. Rep. 426; Mehlinger v. Harriman, 185 Mass. 245, 70 N. E. Rep. 51; Baldwin v. Dow, 130 Mass. 416. By reason of her being an owner or holder in due course without notice of the alteration, under the provisions of section 141 of this chapter she can enforce payment of the note according to its original tenor.

RECENT INSURANCE DECISIONS WHICH ADD UNCERTAINTY TO FUTURE LITIGATION INVOLVING THE CONSTRUCTION OF POLICY PROVISIONS.

The New York standard form of fire insurance policy is required by statute to be used in many states and is voluntarily used in many other states. It is not used in Massachusetts and Minnesota because those states have adopted standard forms of their own. Practically all fire insurance in the

United States is written on the New York standard form, and the interests affected by a decision involving that form of contract mount far up into the billion dollars. No decision has more seriously affected the rights of the insured, under the New York standard form of fire insurance policy, than that of Atlas Reduction Co. v. New Zealand Ins. Co., decided by the United States Circuit Court of Appeals, Eighth Circuit, April 24, 1905, and published in the Federal Reporter of August 10, 1905.[1] The decision of the Supreme Court of the United States, on which it rests,[2] was not so far reaching. It affected, it is true, the power of the insurance agent and declared that his knowledge of other insurance could not be proved to show a waiver of the forfeiture declared in language similar to that used in the Atlas Reduction case. But in the Atlas Reduction case there was an indorsement such as is ordinarily used to show a consent to a chattel mortgage in the form of a loss payable clause. Merely by omitting to state that the chattel mortgage was consented to in so many words the insurance is forfeited. A chattel mortgage is not shown to be consented to by stating in the policy that the loss is payable to individuals who are in fact and to the knowledge of the insurer's *alter ego*, the chattel mortgagee. Had there been an indorsement on the policy in the Grand View Building case of simply "other insurance" without adding the word "permitted" and the decision had been the same, the cases would have been more alike. The cases are both of paramount importance to litigants where the New York standard form of policy is involved. With this statement the language of the court becomes more pertinent than anything the writer of this article can say at this time and the opinion so far as it is confined to the decision of the points in controversy follows. A brief statement of the facts:

This was an action at law by the Atlas Reduction Co., a Colorado corporation, George B. Dodge, and Archie M. Stevenson, upon a policy of fire insurance issued by the New Zealand Insurance Co., a New Zealand corporation, to the reduction company, upon certain property, real and personal—principally personal—belonging to the latter company, and connected with what was known as the "Delano Chlorination Mill." The policy contained these provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." After the issuance of the policy the property insured was incumbered by two mortgages, one of the realty and the other of the chattels, executed to Dodge and Stevenson to secure the payment of an indebtedness owing to them by the reduction company. On the same day the insurance company's agent at Denver, Colo., who had negotiated and issued the policy, made the following indorsement thereon: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson as their interest may appear." Subsequently, during the term for which the policy was issued, and during the continuance of the indebtedness secured by the mortgages, the property was destroyed by fire.

The court says: "One claim of the plaintiffs is that the allegations of the complaint are to the effect that the giving of the chattel mortgage was consented to by the insurance company, acting through those in superior authority, such as the board of directors, and not through subordinate agents, whose power was restricted by the terms of the policy, and that it was not necessary that consent so given be indorsed upon or added

[1] 138 Fed. Rep. 497.

[2] Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. Ed. 213.

to the policy. But, whatever might have been the effect of consent so given, but not indorsed upon or added to the policy, we think the allegations of the complaint are not reasonably susceptible of the interpretation suggested, and that they mean nothing more than that consent to the chattel mortgage was given at the time and place when and where the loss payable indorsement was made upon the policy and by the agents who made that indorsement. The real and controlling question is: What, in view of the plain and unambiguous stipulations in the policy, is the meaning and interpretation of this loss payable indorsement? Obviously, the words used therein must be read in the light of the purpose which actuated the parties in stipulating that policy could be modified, or any provision or condition thereof waived, only by a writing of equal dignity and credit with the policy itself. In this policy it was plainly stipulated that, if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void; that the policy was made and accepted subject to the stipulations and conditions therein, together with such other provisions, agreements, or conditions as should be indorsed thereon or added thereto; that in respect of any provision or condition which by the terms of the policy it was within the power of an officer, agent, or other representative to waive, the power to waive the same could be exercised only by a written indorsement upon or addition to the policy, and that no privilege or permission affecting the insurance should exist or be claimed by the insured unless so written or attached. The loss payable indorsement renewed, and in effect reiterated, all of these stipulations by declaring that it was made 'subject to all the conditions of this policy.' It is plain, therefore, that the indorsement was written upon the policy in pursuance of a mutual and expressly declared purpose to make the policy with the indorsement a complete repository and memorial of the entire agreement, and to preclude any resort to parol evidence. Effect should be given to this purpose so far as it can reasonbly be done, and to that end especial care should be taken to find in the indorsement, and in the policy of which it is part, the means of its proper interpretation. The fact, as alleged in the complaint, that the indorsement was written upon the policy on the same day that the chattel mortgage was executed, is not material, because at most it would only tend to show that the agents of the company knew of the chattel mortgage when the indorsement was written. There being no allegation of fraud or mutual mistake, and this being an action at law, what the agents may have known, and even what they may have said, is of no importance, because by the stipulations of the policy they were powerless to waive any provision or condition or to affect the rights of the parties except by a writing indorsed upon or added to the policy. Whatever was not so indorsed upon the policy or added to it was the same as if not done, because it was not authorized, and was to be without effect. The proper determination of the question whether the incumbrance created by the chattel mortgage was assented to by the company's agents depends entirely upon the true meaning and interpretation of the loss payable indorsement placed by them upon the policy. That indorsement reads: 'Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson as their interest may appear.' Could the insurance company, consistently with a purpose to insist upon and enforce all the conditions of the policy, agree to pay the loss, if any, to Dodge and Stevenson as their interest may appear? If it could, that is plainly what was done. The indorsement does not mention the chattel mortgage, it does not describe Dodge and Stevenson as chattel mortgagees, and it does not show that the attention of the parties was directed to the chattel mortgage. All this is conceded, and the contention of the plaintiffs, as stated in the brief of counsel, is this: 'The language of the indorsement is absolutely broad and embracive. The language is, "As their interest may appear." This is limited only by their ability to make their interest appear. Whatever interest they may be able, by proper proofs and in the proper manner, to make it appear that they possess, necessarily comes within the meaning and terms of this indorsement. The greater includes the less, and if, at the time of the loss, their interest is made to appear to be that of mortgagees, such interest is neces-

sarily included in the terms of this indorsement.' Doubtless this would be a proper interpretation of the words 'as their interest may appear,' if they stood alone or were controlling. They are plainly prospective, and refer, not to an interest existing at the time when the indorsement was written, but to such interest as may appear at the time of the loss, if any, without regard to the character of the interest, or the time when it may have arisen. The interest referred to is not an interest in the property insured, but is an interest in the payment of the loss, whether predicated upon an interest in the property or otherwise. In this respect the terms of the indorsement may be properly said to be 'broad and embracive.' But the question under consideration is not solved by merely ascertaining the meaning of the words 'as their interest may appear.' They do not stand alone, and are not controlling. By the plain terms of the indorsement the consent to pay the loss to Dodge and Stevenson was made 'subject to all the conditions' of the policy. This qualifying clause means that the consent was given upon the express condition that the conditions of the policy were not thereby abrogated or waived, but that they should have effect and be respected in like manner as if the indorsement had not been made. It means that a loss, to be payable to Dodge and Stevenson under the indorsement, must be one which, under the conditions of the policy, would be payable to the insured, and that whatever, under those conditions, would defeat the insured's right to payment in the absence of the indorsement will equally defeat it in the presence of the indorsement. True, if the terms of the indorsement were conflicting—that is, if the appointment of Dodge and Stevenson to receive payment of the insured's loss, if any, was necessarily inconsistent with any condition in the policy—a familiar rule would require that, to the extent of the inconsistency, controlling effect should be given to that appointment, rather than to the qualifying clause. But is there any such conflict! If not, effect must be given to both the appointment and the qualifying clause, if it can reasonably be done, as it is not permissible to assume that any of the words of the indorsement were employed carelessly, or to no purpose. In respect of this the contention of the plaintiffs is that by the use of the words 'as their interest may appear' it was assumed and recognized that Dodge and Stevenson had or might have an interest in the payment of the loss, if any should occur, and therefore that consent was impliedly given to any act by which an interest had been or should be acquired, even though it be one which otherwise would avoid the policy; in other words, that consent was impliedly given to any sale of the property insured which had been or should be made to Dodge and Stevenson," and to any chattel mortgage of the personalty which had been or should be given to them, and to any sale to them of the property which had been or should be made on legal process, and to any assignment to them of the policy which had been or should be made. It is not easily conceivable that an indorsement which so distinctly declared a purpose to insist upon and enforce 'all the conditions' of the policy was really intended to abrogate or waive so many of them. Moreover, it was not essential that any act violative of the conditions of the policy should have occurred or should occur to give Dodge and Stevenson an interest in the payment of the loss. They were creditors of the insured and mortgagees of the insured realty, both of which were consistent with the conditions of the policy, and either of which gave them a sufficient interest in the payment of any loss sustained by the insured to support the loss payable indorsement. There was therefore no necessary inconsistency between the assumption and recognition in the indorsement that Dodge and Stevenson had or might have an interest in the payment of such loss, and the express reservation to the company of the right to insist upon and enforce all the conditions of the policy. In these circumstances it cannot be reasonably said that the words 'as their interest may appear' impliedly gave consent to any act violative of the conditions of the policy. A more reasonable view of the office performed by these words is that they define the contingency in which and the extent to which—consistently with the conditions of the policy—the insured's loss, if any should be sustained, was intended to be made payable to Dodge and Stevenson. Without these words in the indorsement, the whole loss would be payable absolutely to Dodge and Stevenson without

any showing of an interest on their part or of its extent. They are words of restriction, not of enlargement. The purpose and effect of loss payable indorsements upon policies of insurance have frequently been considered in the courts, and, in the absence of some provision to the contrary, it has been quite uniformly held that such an indorsement is a mere appointment of a payee to receive payment of the insured's loss, and does not create a new contract of insurance with the payee, or abrogate or waive any condition of the policy. The conclusion, enforced by the plain terms of the policy and of the indorsement, and by settled rules of decision, is that the purpose and effect of the indorsement was to make Dodge and Stevenson the simple appointees of the insured to receive payment of any loss payable to the insured under the original policy, and to receive it not absolutely, but to the extent of any interest which at the time of the loss they might have in such payment, consistently with the due observance by the insured of all the conditions of the policy; that the indorsement did not in terms or by implication consent to the incumberance created by the chattel mortgage, and that in consequence the policy was avoided by that incumbrance."

It has been quite generally held that though a waiver is required to be indorsed a parol waiver is valid.[3] Notwithstanding these decisions and many others the federal courts adopt a new theory of construction and add confusion worse confounded to an already pitiful situation. No doubt the state courts will refuse to be bound by this last federal decision as they have the former[4] and then this situation presents itself: By removal of a cause to the federal court an insurance company wins; by failure to remove it loses.

The insurance press are fond of striking at companies and individuals purporting to furnish advice to the insured as to how to make their contracts of insurance valid. In view of these decisions an expert insurance lawyer is a necessity to those who carry large lines of insurance to advise as to indorsements if nothing else.

ROBERT J. BRENNEN.

St. Paul, Minn.

[3] 16 American & English Ency. Law, p. 935, note 5, p. 950, notes 2, 3 and 4, p. 951, note 3.
[4] 60 Cent. L. J. 488.

CORPORATIONS — RELIEF GRANTED MINORITY STOCKHOLDERS ON GROUND OF FRAUD.

GLOVER v. MANILA GOLD MIN. & MILL. CO.

Supreme Court of South Dakota, July 6, 1905.

Fraud in management of mining corporation by officers and directors, gives right to stockholder to bring action for appointment of receiver and incidental relief and all transactions growing out of same subject-matter may be joined in one action, where, by such fraud, an attempt is shown to depreciate the stock of company.

CORSON, P. J.: This is an appeal by the defendants from the order overruling defendants' demurrer to the complaint. The complaint is quite lengthy, and we shall only give the substance of the same. The plaintiff, for himself and all others similarly situated who may choose to unite with him, alleges that the Manila Gold Mining & Milling Company is a corporation duly incorporated and organized under the laws of this state, transacting business in the county of Lawrence; that said defendants C. M. and F. H. Woodbridge and I. A. Webb are directors in said mining company, the said C. M. Woodbridge being president, F. H. Woodbridge being secretary, and I. A. Webb superintendent thereof; that the capital stock of said mining company is $1,500,000, divided in 1,500,000 shares, of the par value of $1 per share; that 750,000 shares of said stock have been placed in the treasury of said company to be sold and disposed of for the purpose of raising funds with which to develop the same, for the purpose of purchasing other property and patenting the same, and making such improvements as might be deemed necessary and expedient; that the plaintiff and said C. M. and F. H. Woodbridge and I. A. Webb are owners of an equal amount of the stock of the said company, being 175,000 shares each; that the defendants C. M. and F. H. Woodbridge and I. A. Webb have had and still have and exercise entire control and supervision of the business of the said corporation, being the majority of the board of directors, which, under the by-laws of such company, constitutes a quorum for the transaction of business of the said corporation; that said corporation is the owner of a portion absolute, and the remainder held in trust for said company, of 31 mining claims situated in the Germania mining district, in said county, and fully described in the complaint, and that the said mining company has now and has been for some time past the owner and in the quiet and peaceable control and possession of all of the above-described mining ground; that prior to the year 1903 a large amount of work had been done and performed on said ground, disclosing valuable mineral deposits therein, proving said ground to be of great value, but that for the year 1903 only about $500 worth of work had been done altogether on said claims, which is not sufficient to constitute the annual representation

work to hold said claims under the laws of the United States and the state of South Dakota; that unless the remainder of the representation work is done on or before the 1st day of January, 1904, or steps taken for the protection of said property, it will become subject and liable to relocation as abandoned ground, and thereby will be lost to said company and its stockholders; that the said C. M. Woodbridge, F. H. Woodbridge, and I. A. Webb, directors and officers as aforesaid of said corporation, and exercising full control and management of the same, have unlawfully and fraudulently conspired, colluded, and attempted, and are now unlawfully and fraudulently conspiring, to manipulate and manage the business of said corporation so as to depreciate the value of its property, and render, if possible, worthless the stock held therein and owned by this plaintiff; that said directors and officers have made no attempt to dispose of the treasury stock, or any portion thereof, for months past, by which to raise the necessary funds to do the annual assessment work on said claims; that plaintiff is advised by the treasurer of said corporation that there are no funds in the treasury, and plaintiff has reason to believe and does believe that the said defendant directors intend and propose to allow said mining claims to become subject to relocation, and have the same located in the name of a friend or friends of theirs, whereby the stock and interest of this plaintiff held in said corporation shall be rendered absolutely of no value; that said defendant directors have not only failed and neglected to sell and dispose of any treasury stock for the purpose of doing and performing any of said representation work, but they have also refused to sell or issue shares to a purchaser who had given his note for the same, and made partial payments thereon, and tendered the balance due on the issuance and delivery of said stock; that the development work on the Manila Gold Mining & Milling Company's property was discontinued more than one year ago by order of said directors, who have since said time pursued a systematic course for depreciating the property and stock of the said Manila Corporation, with the intent and purpose of defrauding this plaintiff, refusing to sell any treasury stock thereof or to continue development work, and have refused to do and continue to refuse to do even surface work sufficient to hold said claims for the year 1903 unless this plaintiff contributes $500 out of his private resources, or consents to sell his stock at a nominal sum; that said property can be safely and economically developed and assessment work thereon fully done in the shaft already commenced on said property, sunk to a depth of 119 feet when ordered by said board to be closed down, more than one year ago; that at all times since the 18th day of January, 1902, when the development work was closed down by said company through the action of said defendant directors, there has been an ample supply of tools, hoists, and machinery and buildings on said property, in connection with said shaft, to continue development, and expose and block out the ore bodies, ready for breaking down and milling; that by the negligence, want of care, fraudulent conspiracy and conduct of said defendant directors and officers, the value of the shares of stock of the Manila Company have been greatly depreciated, to the damage of said Manila Gold Mining and Milling Company in the sum of $50,000, no part of which has been paid, and, unless some immediate relief is granted, the said company's loss will be irreparable; that all the books and records of the corporation are no longer kept in this state, as required by law, but have been removed therefrom, and outside the state entirely; that plaintiff can have no access thereto for the purpose of examination or ascertaining what is being done by said board in the management of the affairs of said company, and that no report of the financial condition of the corporation can be obtained by him from any of its officers, although he has repeatedly made requests for the same; that this plaintiff has no knowledge and no means of ascertaining the amount of treasury stock that may have been sold, or what use or disposition has been made of the proceeds arising from said sales, and that, as a stockholder of such corporation, he has a right to have, and does demand, an accounting from the officers of said company, showing the true condition of its business, sale of its treasury stock, and to what purpose the proceeds arising therefrom have been applied; that he has reason to believe and does believe that money and property belonging to the said Manila Corporation have been wrongfully and fraudulently diverted from the uses of said company, and removed and used and appropriated to the use and benefit of a corporation known as the Safe Investment Company, which corporation is owned almost entirely by the defendant directors, but of such transaction he has no means of ascertaining or of examining the books or records of said Manila Company, or of the property belonging thereto; that said Manila Mining & Milling Company is in imminent danger of insolvency, and, unless immediate relief is granted herein, its entire holdings of property will be lost to the company and to its stockholders. And plaintiff demands judgment (1) for $50,000 damages; (2) for an accounting by said defendant directors and officers of their doings and transactions in connection with the management of the business affairs of the said corporation, including the sales of the treasury stock, disposition of funds arising therefrom, the indebtedness of said corporation, character and value of all personal property, and all such other items as may disclose the present condition and financial standing of said corporation; (3) for the appointment of a receiver to take charge and supervision of all the property of said company; (4) that said defendant directors and officers be

enjoined from in any manner interfering with said property or disposing of or incumbering the same, or from transacting or attempting to transact any business pertaining to the corporate rights or privileges of said corporation, for his costs, and for such other and further relief as to the court may seem equitable and just.

To this complaint the defendant C. M. Woodbridge interposed a separate demurrer upon the following grounds: (1) That there is a defect of parties, both plaintiff and defendant; (2) that several causes of action have been improperly united; (3) that plaintiff's amended complaint does not state facts sufficient to constitute a cause of action. As before stated, the demurrer was overruled, and the defendant given leave to answer over if he elected so to do.

It is contended by the appellant in support of his demurrer that there were several causes of action improperly united in the complaint; that three of the defendants are charged in the complaint with having fraudulently conspired and colluded together to so manipulate the affairs of the defendant company as to depreciate and render the plaintiff's stock worthless; that the complaint contains nothing but conclusions of law, and does not state or purport to state a single act constituting conspiracy, collusion, or fraud of any kind, and that an allegation, to charge one with fraud, must set out some act or conduct constituting the fraud; and that, if this is not done, proof of the acts constituting the fraud is not admissible.

We are of the opinion that the appellant's contention that different causes of action have been improperly united is not tenable. In our view, the complaint contains but one cause of action, namely, that the defendants conspired together to unlawfully and fraudulently depreciate the value of the Manila Company's stock in order to render the plaintiff's stock and the stock of other parties similarly situated practically worthless, and that in order to accomplish this object the three directors named proceeded to do certain acts specifically set out in the complaint, which would necessarily produce results intended by the conspiracy. The plaintiff, in his complaint, proceeds to state the fraudulent acts of the defendants which tended to depreciate and which did depreciate the value of the company's stock, and that, by reason of such fraudulent acts on the part of the three defendants named, the Manila Company was damaged in the sum of $50,000, in which it appears that the plaintiff had a one-eighth interest; and it is alleged that in carrying out that fraudulent purpose they have refused to dispose of the treasury stock, embracing one-half of the capital stock of the company, have systematically depreciated its value, have refused to receive money for the treasury stock, have refused to do the necessary assessment work upon the property in order to comply with the laws of the United States and this state, have removed the books of the corporation out of the state, have refused the plaintiff any information in regard to the affairs of the company, and in short have proceeded to so conduct the business of the corporation as to destroy the value of the shares, in order that they may be enabled to relocate the property in the name of other parties, and thereby deprive the plaintiff of his stock, or render it practically worthless. If these allegations are true—and for the purpose of the demurrer they must be assumed to be true—then these defendants are guilty of gross mismanagement of the company's affairs for the purpose of depreciating the value of plaintiff's interest therein. It is quite clear that under the allegations of the complaint the plaintiff has stated but one cause of action, and that the various fraudulent acts of the defendants set out in the complaint were intended as statements of acts done by them in carrying out their fraudulent conspiracy to depreciate the value of the company's property and render it comparatively worthless, in order to carry into effect their fraudulent design to secure the property for themselves and their friends, and to deprive the plaintiff and other stockholders similarly situated of their interest therein.

The contention of the appellant that the plaintiff claims personally a judgment for $50,000 is untenable, as it will be observed that the plaintiff alleges that the $50,000 of damages have accrued to the defendant corporation, and not to himself personally. The action is in effect an action by the corporation, brought for the purpose of protecting the property of the corporation against the fraudulent and unlawful acts of its board of directors, and which could not be brought by the corporation for the reason that the directors, who were managing the affairs of the corporation, and whose duty it would ordinarily be to bring such an action to protect the interests of the corporation, are the parties who have conspired together to so mismanage the affairs of the corporation as to destroy the value of its property, and in effect to render its stock worthless, and which would certainly result in depriving the plaintiff of his interest in the property. But assuming the claim of the appellants that there were two or more causes of action set out in the complaint, and that the same were separately stated to be true, their contention that they were improperly united would be clearly untenable under our present code system. Under our present code system, in an action in equity a claim for damages may be united with a claim for equitable relief. In Lamming v. Gulusha, 135 N. Y. 239, 31 N. E. Rep. 1024, the plaintiff instituted an action for an injunction restraining the unlawful maintenance and operation of a railroad in the street in front of his premises, by reason of its continuous interference with his rights of property, and united therewith a demand for equitable relief, a demand for damages because of such interference, and also a claim for per-

sonal injury suffered on a particular occasion from the same unlawful appropriation and use of the highway. The Court of Appeals of the state of New York held that such a complaint was proper, and in its opinion the court says: "But the question here is whether a plaintiff, having a cause of action which entitles him to an injunction restraining the maintenance and operation of the railroad by reason of its continuous interference with his rights of property, may unite with the demand for equitable relief by injunction and for damages for such interference a claim for damages for a personal injury suffered on a particular occasion from the same wrongful appropriation and use of the highway, or, in other words, whether he may unite in a single action all his claims, legal and equitable, which arise in consequence of the same general cause, viz., the nuisance maintained by the defendant. This is a question of procedure, governed by the course and practice of the court, or by the statute, if made the subject of statute regulation. We are of the opinion that the causes of action were properly united, under section 484 of the Code of Civil Procedure, which authorizes the plaintiff to unite in his complaint two or more causes of action, whether such as were formerly denominated legal or equitable, or both, in the cases specified, and among others: 'Subd. 9. Upon claims arising out of the same transaction or transactions connected with the same subject of action and not included within one of the foregoing subdivisions.'" The provision of section 144 of Code of Civil Procedure of this state is practically, if not identically, the same as the section referred to by the Court of Appeals of New York in the above opinion. The section of our Code referred to provides as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of (1) the same transaction, or transactions connected with the same subject of action." It will be observed in the case above referred to that there was not only an action for an injunction and damages, but an action for personal injuries arising out of the same transaction, and that these were held to be all properly united in the one action. And the view expressed in this opinion is sustained by the following cases: People v. Metropolitan T. Co., 31 Hun, 598; Akin v. Davis, 11 Kan. 580; Dawson Bank v. Harris, 84 N. Car. 206; England v. Garner, 86 N. Car. 366; Blake v. Von Tilborg, 21 Wis. 672; Blair v. Chicago Railroad, 89 Mo. 383, 1 S. W. Rep. 350; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. Rep. 119; Bowen v. State, 121 Ind. 236, 23 N. E. Rep. 75. The contention of the appellants, therefore, that the demurrer should have been sustained on the ground of improper joinder of causes of action, is clearly untenable.

The right of stockholders to bring such an action is clearly sustained by the decision of this court in the case of Loftus v. Farmer Shipping Ass'n, 8 S. Dak. 201, 65 N. W. Rep. 1076, in which this court held that stockholders of a corporation may bring an action on behalf of the corporation against its directors, who in their fraudulent management and conduct of the business of the corporation are fraudulently and intentionally so conducting the business of the same as to depreciate the value of the stockholders' interest therein, and in effect deprive them of their property.

The contention of the appellant that the acts constituting fraud on the part of the three directors named as defendants are not specifically set out in the complaint is also untenable. It will be observed that the complaint has stated very fully the various acts done and being done by the said defendants in carrying out their conspiracy, and, if true as alleged, clearly show that these defendants are violating their trust as officers of the corporation, and that their mismanagement of the affairs of the corporation would necessarily result in destroying the value of the property of the corporation, and, as before stated, practically deprive the plaintiff of his property therein.

Our conclusion, therefore, is that the corporation was entitled, through the plaintiff, to relief as against the directors named, for an accounting, and an injunction restraining them from the commission of further acts in the pursuance of their unlawful conspiracy, and for a receiver to protect the interests of the corporation, and prevent the forfeiture of its property under the laws of the United States and this state, and preserve the corporation, as far as possible, from the further depreciation of the value of its property, and to prevent, if possible, its actual insolvency. In the case of Dudley v. Dakota Hot Springs Co., 11 S. Dak. 564, 79 N. W. Rep. 1127, this court held that under the allegations of the complaint in that case a receiver could not be appointed. But no insolvency or threatened insolvency was therein alleged. But where, as in the case at bar, the allegations of the complaint show that insolvency is imminent, and the entire loss of the property of the corporation is likely to result from the illegal acts of the directors, the appointment of a receiver would be proper, to protect the corporate property. As will be noticed, in the case at bar it is alleged that the directors have failed to do the necessary assessment work upon the mining claims to comply with the requirements of the law of the United States and of this state, and the law declares that in case of such failure the mining claims will be subject to relocation by other parties if such assessment work is not performed within the year; and the necessity for a receiver in such an action, to protect the interests of the corporation, is clearly apparent. Whether or not the plaintiff, acting for and in behalf of the corporation, would be entitled to recover damages sustained by such corporation by reason of the fraudulent and illegal acts of

the defendants, it is not now necessary to determine.

We are of the opinion that the court was right in overruling the demurrer, and the order overruling the same is affirmed.

NOTE.—*Corporations—Fraud of Director Intending to Injure and Depreciate Value of Stock—Stockholder's Right to Sue.*—The first case with reference to the right of minority stockholders to bring suit for the benefit of a corporation, against the directors for breach of duty to corporation was that of Foss v. Harbottle, 2 Hare, 461. This case was decided against the stockholders on the ground the complainant had not proved that the corporation itself was under the control of the guilty parties, and had not proved that it was unable to institute the suit. The court however broadly intimated that a case might arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion and impelled by the utter inadequacy of the suits instituted by the corporation, the defrauded stockholders continued to bring these suits and urge the courts of equity to grant relief. These efforts were unsuccessful in clearly establishing the rights of the stockholders herein until the case of Atwood v. Merrywether, L. R. 5 Eq. 464, in England in 1867, and Dodge and Woolsey in this country in 1855. See 18 How. 331. The case of Hawes v. Oakland. 104 U. S. was perhaps of even greater importance than Dodge v. Woolsey and may take the place of the latter. See Cook on Corporations, Vol. 2, sec. 645, These two great and leading cases have firmly established the law for both England and America that where corporate directors have committed a breach of trust either by their frauds or *ultra vires* acts, or negligence and the corporation is unwilling to institute suit to remedy the wrong, a single stockholder may institute suit suing in behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.

It is frequently said both in cases and text-books that the directors of the corporations are practically trustees with the whole body of stockholders as *cestuis que trust*. The New York Court of Appeals, however, said in Bloom v. National United, etc., Co., 152 N. Y. 114 (1897) that, "directors are trustees in their relations towards the corporation but not in their relations towards the stockholders." And in Bosworth v. Allen, 168 N. Y. 157 (1901), "that while courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct."

For a full discussion of the rights of minority stockholders to sue directors for fraud or *ultra vires* acts, see 50 Cent. L. J. 44.

Under the Code Procedure an Action for Injunction and Damages and for Personal Injuries Arising Out of the Same Transaction are Properly United in One Action.—The codes of procedure in nearly all the western states are taken from the New York code and the same language is used as that shown in the principal case. But even though the statute makes provision for uniting all matters arising out of the same subject of action still this was a thing which equity in its breadth might do without the legislative enactment under the rule that equity having taken jurisdiction for one purpose would retain it to do complete justice. Some courts have labored under the impression that even where there is a demand for double relief growing out of the same subject-matter there should be separate counts. Girard v. St. L. Car W. Co., 123 Mo. 390. This is a mistake however; in equity all the matters may be stated together and the court will grant such relief as the facts stated may warrant even without a prayer for relief in Massachusetts. 16 Cyclo. L. & P. p. 225.

And upon principle why should a person be required to add a prayer to a petition in equity, when by the very fact that he has appealed to equity, ought to be sufficient to gain the relief which the facts stated warrant. As was said by Lord Selbourne, in Jervis v. Berridge, L. R. 8 Ch. App. Cases. "Upon principle there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required, on the face of the bill, to submit to those terms which the court at the hearing may think it right to impose as the price of any relief to which he may be entitled." Of course this refers to the sometime requirement that the face of the petition must show that the petitioner offers to do equity.

If this follows upon principle why does it not follow as fully that equity will grant whatever relief the facts shown on the face of the bill require of equity, whether there be a prayer or not.

JETSAM AND FLOTSAM.

CONVEYANCE OF LAND UPON AN ORAL TRUST.

When land is conveyed upon an oral trust, the grantee, who refuses to perform his promise under the protection of the statute of frauds, is by the English courts made a constructive trustee for the grantor. Davies v. Ottley, 35 Beav. 208; *In re* Duke of Marlborough (1894), 2 Ch. 133. In the United States, however, he may repudiate his unenforceable obligation and keep the land upon payment to the grantor of its fair market value. Burt v. Wilson, 28 Cal. 632. But if the conveyance was induced by fraud a constructive trust arises. And on account of the harshness of the general American doctrine, a ready disposition to find fraud from the circumstances of the case or the relation of the parties is manifested.

Thus, even though the conveyance was not actively induced, a present intention not to execute the trust constitutes sufficient fraud to vitiate the transaction, and the subsequent repudiation is evidence of a fraudulent purpose at the outset. Brown v. Doane, 86 Ga. 32. Similarly, where a confidential relation exists between the parties, the transaction is presumed to be fraudulent. Wood v. Rabe, 96 N. Y. 414. Just what constitutes confidential relations is somewhat in dispute. There is, for example, a square conflict whether a conveyance to a wife upon an oral trust is ground for equitable intervention. See Brison v. Brison, 75 Cal. 525. *Contra*, Brock v. Brock, 90 Ala. 86. The tendency of the courts, however, is illustrated by a recent Nebraska decision. The plaintiff, who owned a half-interest in land, conveyed his share to his co-owner upon an oral agreement by the latter to reconvey. He was allowed to recover his interest on account of the fiduciary relation between the parties. Koefoed v. Thompson, 102 N. W. Rep. 268.

The basis of the American rule seems to be the conception that to raise a constructive trust, as the English courts do, would be to go directly in the

teeth of the statute of frauds. Of course, where the transaction is tainted with actual fraud, the statute does not apply and restitution is the ordinary equitable remedy. To imply fraud, however, from the relation of the parties is simply to use a fiction to avoid the application of an unpalatable doctrine. The injustice of allowing the grantee unduly to enrich himself, is recognized by charging him with the value of the land. This is a direct admission that he has received something which he is not entitled to keep, and it is, therefore, difficult to see why restitution is not the proper remedy. See Dickerson v. Mayo, 60 Miss. 388. In the analogous case, where a deed absolute on its face is in fact given by way of mortgage, the American courts cannot enforce the parol agreement. The Wisconsin court, in a leading decision, frankly admits that these cases are indistinguishable, but regards them as an encroachment upon the statute of frauds, and refuses to extend the exception. To consider the creation of a constructive trust in cases of this class as a judicial contravention of an express statute seems to be a misconception. The oral trust is given no more weight under these circumstances than in the case of fraud. The grantee may repudiate his express promise with impunity, but in so doing he should not be allowed to enrich himself unjustly at the grantor's expense. Equity therefore fastens upon him a new obligation to return what is unconscionable for him to keep. This new obligation is a constructive trust, expressly excepted from the operation of the statute of frauds. It is raised upon the same principle that creates a resulting trust where property is given upon an express trust which proves to be void. When the oral trust is for the benefit of a third party, a constructive trust for the grantor can hardly be said to contravene the statute; when the oral trust is for the benefit of the grantor himself, the mere fact that relief by restitution achieves a result identical with that of enforcing the oral trust should be immaterial. The right ought not to be confused with the remedy.—*Harvard Law Review.*

SETTLING A FAMILY RUCUS IN NORTH CAROLINA.

Nearly in front of the Yarborough House, on Fayetteville street in Raleigh, N. Car., and within fifty yards of the court-house was witnessed some days ago the most remarkable court proceedings seen in North Carolina since the reconstruction times of "Greasy Sam Watts," who, by the way, was one of the best judges of common sense who ever sat upon the superior court bench in the state, even if it has been said that he was short on knowledge of the common law. But, deficient as this then famous character may have been, and was, in technical knowledge of the law, he had a habit of being overruled by the supreme court in fewer cases that went up on appeal from his rulings than any judge then on the superior court bench, for his common sense always led him to consult with and obtain the opinions of the leading lawyers of the bar, not retained, before deciding a knotty point that was raised on the trial of any case before him. This famous character, dubbed "Greasy Sam" by Josiah Turner, a no less famous character, ended his days by making a living selling "Watts' Bed Bug Poison." But to return to the path of this story:

Beginning at the capitol, in the executive office. Enter a weeping woman, age about forty-five, and her daughter, about twenty and comely. The woman relates a tale of marital infelicity to his excellency. The gallant governor's sympathies being aroused by the visible signs of feminine distress, and as the chief magistrate of a great state, he vows that justice shall be done to even the most humble; the woman and her daughter are directed to seek the office of a certain new justice of the peace, who had been recently appointed.

The directions were followed and the complaints of the woman were duly laid before his worship, charging a breach of the peace and dignity of the state by the husband in his conduct toward the wife of his bosom. The justice forthwith sought the advice of a certain lawyer, learned in the law and skilled in unravelling the tangles into which married folks sometimes fall, when one has too frequently visited the Raleigh dispensary and imbibed too freely of the reeking "rosy" with the flies left in.

The township constable is summoned and is armed with a proper warrant authorizing him to capture and forthwith have the body of said delinquent husband, before his worship, to answer. He hurried to a four-room cottage in the suburbs of the city and soon returned with his prisoner seated upon an old gray mare, his left foot swathed in many bandages, looking like a canvassed ham of western brand. He plead that he was too lame to dismount and climb the stairs leading to the lawyer's office on the second floor of one of the big office buildings, where his worship had appointed the trial. A hurried consultation was held upon this unusual plea of the prisoner, and the lawyer advised that the court and the prosecuting witness and her comely daughter adjourn to the street and there dispose of the weighty matter versus pater familias.

But the woman demurred. Her intuitive sense of the ethical and proper procedure in all matters familiar being superior to the lawyer's learning (for woman's intuition is more than learning), who argued that anciently the courts of the Anglo-Saxons were held under the trees and in the open, and hence our trials in open court. But when a woman wills, and her sense of what is ethically proper in matters growing out of, or connected with, family affairs, is at issue with a lawyer's learning in ancient court procedure, why, the lawyer's learning had to give in so far as her appearing in the court below—stairs—so the court and the lawyer, armed with a copy of the St. James version—no new or revised version is a proper vehicle to carry an oath since kissing the Book has been adjudged necessary by the supreme court—proceeded to the prisoner instead of his coming to court.

There it was the attention of a bystander was attracted to the scene by hearing the staccato tones of the lawyer, and this is what he saw and heard:

The court was standing barehead at the curb-stone, the prisoner seated on the old gray mare, with Bible in hand, the constable holding the mare's bridle as if he feared the escape of the evidently frightened prisoner, and the lawyer administering the following extra-judicial oath in the most solemn form:

"Do you solemnly swear upon the holy evangelists of Almighty God that you will instantly go home, get sober, keep sober, drink no more dispensary liquor, flies, straws, barrel-chipping to the contrary notwithstanding; and that you will forever hereafter love, honor and obey your wife, the prosecuting witness, and keep her, in sickness and in health, so long as you both shall live; and from now on, for the full term of six months at least, you will give her no further cause of complaint against you by having "crim con" or ungodly conversation with one Sally Warren in particular, or other women in general,

without first informing your wife thereof and obtaining her consent? And you acknowledge yourself indebted to the state of North Carolina in the penal sum of fifty dollars to be levied out of your earthly goods and chattels, conditioned, nevertheless, upon your strictly keeping the promises you have here given in the presence of this august court; and that you will, six months from this date, report to the court that you have done so, with your wife and daughter for witnesses, then this bond to be void; otherwise to remain in full force and effect; and may God have mercy upon your soul. So help you, God. Kiss the Book."

"You can go," said the court.

The comical figure and the old gray mare moved off down the street, and something like a long-drawn sigh was borne back to our ears.

Sequel: The court is informed that peace and happiness abounds in that cottage in the suburbs, and the week's wages go into the hands of the wife to purchase supplies for the family. The next report of the profits of the city booze mill will be short several dollars from that source.

This is an actual occurrence, and though the oath was extra-judicial, the result is according to law and order.

BOOKS RECEIVED.

The American Digest Annotated, continuing without omission or duplication the Century Edition of the American Digest, 1658 to 1896. 1905 A. A Digest of all Current Decisions of all the American Courts as Reported in the National Reporter System, the Official Reports, and elsewhere, together with important English Cases, from October 1. 1904, to March 31, 1905. And Digested in the Bimonthly Advance Sheets for December, 1904, and February and April, 1905 (Nos. 184-186). Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn., West Publishing Company, 1905. Review will follow.

The Principles of the American Law of Contracts, at Law and in Equity. Second Edition. By John D. Lawson, LL. D. Dean of the Department of Law and Professor of Contract and International Law in the University of Missouri; Author of a Companion Work on the Principles of the Law of Bailments. St. Louis: The F. H. Thomas Law Book Co., 1905. Sheep, pp. 714. Price, $5.00. Review will follow.

The Law of Crimes. By John Wilder May, Chief Justice of the Municipal Court, and Late Prosecuting Officer for Boston. Third Edition, Edited by Harry Augustus Bigelow, Assistant Professor of Law in the Law School of the University of Chicago. Boston: Little, Brown, and Company, 1905. Sheep, pp. 420. Price, $3.50. Review will follow.

HUMOR OF THE LAW.

An Arkansas man charged with stealing a calf, made the following statement: "I was always teached to be honest, an' most always have been, but when I seed that calf I caved. I never wanted a calf so bad in all my life, an' you all know that when a man wants a calf he wants him."

The jury returned the following verdict:

"We, the jury, are satisfied that Steve stole that calf, but as the feller that owned the animal is considerable of a slouch, we agree to clear Steve an' make the slouch pay the costs."

A good story is told regarding a witty encounter between Sir Henry Irving and the late Judge F. Carroll Brewster at one of the Penn club receptions. The men were mutually attracted and talked to one another with great relish. Judge Brewster argued with much interest about a certain public man in London. Sir Henry answered him at some length, and, becoming interested in his subject, said, tragically: "But the man is a mere pettifogging lawyer—a pest of society."

Then, seeing the look of surprise upon the countenance of his friend, he added:

'You must understand that I said a mere pettifogging lawyer—not a member of the bar, who, like yourself, is an ornament to society."

Mr. Brewster smiled and inclined his head with that grace and culture for which he was so justly noted, and the conversation soon drifted to other subjects. Presently Sir Henry began to talk about national politics, and asked Judge Brewster to give him his opinion of a certain man who was then occupying a large share of public attention. The judge, in replying, did so with vigor and emphasis.

"Why, the man," he said, "has nothing to commend him. He is insincerity itself. He is a mere actor playing to the galleries."

It was Sir Henry's turn to look up with surprise, but his friend recovered himself instantly, saying:

"I mean a mere burlesque actor, who murders his lines and has no conception of real histrionic art. Not one of the ligitimate, like yourself."

And then the real lawyer and the real actor joined in a hearty laugh.—*Boston Post.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Lis Pendens.—Defendant cannot plead *lis pendens*, where there is no other suit pending growing out of the same cause of action.—Conner v. Pozo, La., 38 So. Rep. 454.

2. ACCORD AND SATISFACTION—Offer and Acceptance.—Where an offer of money is made on certain terms and taken without words of assent, its acceptance involves the acceptance of the condition.—Richardson v. Taylor, Me., 60 Atl. Rep. 796.

3. ACTION—Misjoinder.—In an action against certain railroads for improper use and maintenance of terminal facilities, causing injury to the use and enjoyment of plaintiff's house and lot, a declaration held not objectionable for misjoinder of an action for injuries to the health of plaintiff's wife and children.—Louisville & N. Terminal Co. v. Lellyett, Tenn., 85 S. W. Rep. 881.

4. ACTION—Money Had and Received.—Where property has been converted, but the pleadings do not show conversion into money, a suit for the value of the property is an action *ex delicto*.—Southern Ry. Co. v. Born Steel Range Co., Ga., 50 S. E. Rep. 488.

5. ACTION—Petition for Recovery of Land.—Petition for recovery of land, praying in the alternative for other relief, held not subject to demurrer for misjoinder of causes of action.—Watkins v. Collins, Tex., 87 S. W. Rep. 363.

6. ADULTERY—Living Together.—Carnal intercourse between defendant and his general servant held insufficient to sustain a conviction under an indictment charging a living together and having carnal intercourse.—Boswell v. State, Tex., 85 S. W. Rep. 1076.

7. ADVERSE POSSESSION—Title to Right of Way.—A railroad, which has no title to its right of way by grant, verbal donation, or eminent domain, acquires a prescriptive title to such land as it actually occupies.—St. Louis Southwestern Ry. Co. v. Davis, Ark., 87 S. W. Rep. 445.

8. ANIMALS—Establishment of Stock Law.—Freeholders and leaseholders in municipality, not given opportunity to sign petition for establishment of stock law, will be counted against it.—Stockton v. Caldwell, Miss., 38 So. Rep. 369.

9. APPEAL AND ERROR—Argument of Counsel.—Language used by counsel in argument held no ground for reversal where the matter was not called to the attention of the court nor objected to at the time.—St. Louis Southwestern Ry. Co. of Texas v. Martin, Tex., 87 S. W. Rep. 387.

10. APPEAL AND ERROR—Assignments of Error.—Where the admission of evidence is assigned as error, the court cannot correct an error alleged in the charge relating to such evidence, where the portion of the charge has not been assigned as an error.—McCarthy v. Philadelphia & R. Ry. Co., Pa., 60 Atl. Rep. 778.

11. APPEAL AND ERROR—Burden of Proof.—In order to justify the reversal of a judgment for insufficient evidence, the burden is on the complaining party to show that the evidence presents a question of law which has been erroneously decided.—Heath v. Sheetz, Ind., 74 N. E. Rep. 505.

12. APPEAL AND ERROR—Clerical Error in Excepting to Instruction.—Where, on appeal, it appears that in taking an exception to an instruction counsel made a clerical error, held, that he is not to be prejudiced thereby.—Pichon v. Martin, Ind., 73 N. E. Rep. 1009.

13. APPEAL AND ERROR—Effect of Suit Dismissed Without Prejudice.—A suit dismissed without prejudice is not a bar to a second suit, nor conclusive of any issue joined in favor of the complainant.—Robinson v. American Car & Foundry Co., U. S. C. C. of App., Seventh Circuit, 135 Fed. Rep. 698.

14. APPEAL AND ERROR—Evidence.—A party cross-examining a witness held not prejudiced by the exclusion of a paper containing statements made by the witness contradictory to his testimony on the trial.—Chicago & E. I. R. Co. v. Crose, Ill., 73 N. E. Rep. 865.

15. APPEAL AND ERROR—Failure to Except to Instruction Given.—Where no exception was taken to an instruction, assigning the giving thereof as cause for a new trial presents no question for decision on appeal.—White v. Sun Pub. Co., Ind., 73 N. E. Rep. 890.

16. APPEAL AND ERROR—Harmless Admission of Improper Evidence.—The admission of incompetent evidence is not ground for the reversal of a judgment which is fully supported by uncontradicted evidence properly admitted.—United States v. Brendel, U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 787.

17. APPEAL AND ERROR—Judment Where Only One Issue is Complained of.—Where there are two or more issues, on either of which the judgment may rest, and only one is complained of, the judgment may rest upon others, when supported by any evidence.—St. Louis Southwestern Ry. Co. of Texas v. Ratley, Tex., 87 S. W. Rep. 407.

18. APPEAL AND ERROR—Motion to Dismiss.—Alleged incompleteness of the transcript is no ground for dismissal of an appeal, where the certificate of the clerk shows that the record is complete, and the mover does not show that alleged documents omitted are pertinent to the issues to be determined on the appeal.—Succession of Theriot, La., 38 So. Rep. 471.

19. APPEAL AND ERROR—Necessity of Sequestration After Appeal Taken.—Where the necessity arises after an appeal has been taken, the trial court has jurisdiction to order the sequestration of the property which is the subject of the litigation.—Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., La., 38 So. Rep. 458.

20. APPEAL AND ERROR—Questions for Review.—Appellate court held not required to consider assignments of error as to the rulings on pleadings.—Chaplin v. Leapley, Ind., 74 N. E. Rep. 546.

21. APPEAL AND ERROR—Review of Evidence.—It is a unanimous decision of the appellate division, not of the general term of the city court, that limits the review of the evidence by the court of appeals, under Const., art. 6, § 9.—Klein v. East River Electric Light Co., N. Y., 74 N. E. Rep. 495.

22. APPEAL AND ERROR—Where Record Does not Disclose Exceptions.—Where the record does not disclose that an exception was reserved to the submission of interrogatories, it cannot be considered.—M. S. Huey & Co. v. Johnston, Ind., 73 N. E. Rep. 996.

23. ARBITRATION AND AWARD—Valuers in Executory Sale of Goods.—Where one of the persons nominated in an executory agreement for the sale of goods as a valuer refused to act, the other has no power, without the consent of both parties, to select a third person as valuer.—Elberton Hardware Co. v. Hawes, Ga., 50 S. E. Rep. 964.

24. ASSAULT AND BATTERY—Argumentative Instructions.—In a prosecution for assault with intent to murder, a charge stating an undisputed fact as a basis for a discussion of the case held not erroneous.—Brown v. State, Ala., 38 So. Rep. 268.

25. ATTACHMENT—Collateral Attack.—The fact that the service of a writ of attachment is informal cannot be taken advantage of by a third person claiming the property.—Hawkins & Co. v. McAlister, Miss., 38 So. Rep. 225

26. ATTACHMENT—Grounds.—Where a debtor has left the county and established his residence in another, an attachment on the ground that he is "actually removed or about to remove" from the county will not lie.—Brooks v. Hutchinson, Ga., 50 S. E. Rep. 926.

27. BANKRUPTCY—Adverse Claims to Property.—A referee in bankruptcy has authority to entertain and consider the claim of an intervening petitioner to property or its proceeds in the hands of a trustee, alleged to be the property of the petitioner and not of the estate in bankruptcy.—*In re* Drayton, U. S. D. C., E. D. Wis., 135 Fed. Rep. 883.

28. BANKRUPTCY—Adverse Claim to Property.—A petition filed in a bankruptcy proceeding by an adverse claimant of property, which is also claimed by the trustee as a part of the bankrupt's estate, to determine the ownership thereof, presents a controversy in relation to the estate, of which the court of bankruptcy is given jurisdiction.—*In re* Hadden Rodee Co., U. S. D. C., E. D. Wis., 135 Fed. Rep. 886.

29. BANKRUPTCY—Effect of Discharge.—Where an administrator misappropriated funds of the estate and died, a discharge in bankruptcy held a bar to an action against a surety on his bond.—Harmon v. McDonald, Mass., 73 N. E. Rep. 883.

30. BANKRUPTCY—Failure to Keep Books of Account.—Failure to keep books of account held not ground for refusing bankrupt a discharge.—*In re* Keefer, U. S. D. C., W. D. N. Y., 135 Fed. Rep. 885.

31. BANKRUPTCY—Liens.—A contractor's trustee in bankruptcy stands in better position with reference to the lien claim of a materialman than would the contractor's general assignee for the benefit of creditors.—*In re* Grissler, U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 754.

32. BANKRUPTCY—Opposition to Discharge.—Under general orders in bankruptcy No. 52 [29 Fed. Rep. xiii), a creditor opposing a discharge held required, unless for good cause, to enter appearance not later than the return day.—*In re* Grant, U. S. D. C., E. D. Pa., 136 Fed. Rep. 889.

33. BANKRUPTCY—Recovery of Funds.—Money applied to salary by the manager of a bankrupt's business, as he was authorized to do, before filing of the bankruptcy petition, held not recoverable by the trustee as money belonging to the bankrupt.—*In re* Lebrecht, U. S. D. C., W. D. Tex., 135 Fed. Rep. 878.

34. BANKS AND BANKING—Authority of Cashier to Extend Payment of Note.—A bank cashier has no implied power to receive money for interest in advance on a note owned by the bank and extend time of payment and discharge an indorser.—Bank of Ravenswood v. Wetzel, W. Va., 50 S. E. Rep. 886.

35. BILLS AND NOTES—Consideration for Renewal Note.—The surrender of a valid enforceable note is sufficient consideration for the execution of a renewal note.—Garrigue v. Keller, Ind., 74 N. E. Rep. 523.

36. BILLS AND NOTES—Failure of Consideration.—Where the consideration of a note was certain services to be performed, failure of performance was no defense in action by *bona fide* purchaser not knowing of failure of consideration when he bought.—Wilensky v. Morrison, Ga., 50 S. E. Rep. 472.

37. BILLS AND NOTES—Notice of Defect.—A party who takes negotiable paper before maturity in good faith obtains a valid title, though he had knowledge sufficient to put a prudent man on inquiry.—Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co., W. Va., 50 S. E. Rep. 880.

38. CANCELLATION OF INSTRUMENTS—Leases.—Beneficiary in adeed of trust conveying a leasehold held not entitled to foreclose the same, but the lessor entitled to have the deed canceled.—Gunning v. Sorg, Ill., 73 N. E. Rep. 870.

39. CARRIERS—Damages to Live Stock Shipment.—In an action for damages to live stock by delay in transit, evidence of actual loss in vale of the animals held competent, where there was no market at their destination.—Texas & P. Ry. Co. v. Ellerd, Tex., 87 S. W. Rep. 862.

40. CARRIERS—Live Stock Shipment.—Where a carrier takes horses for transportation beyond its own line and transfers them to an unsuitable car, and they are thereby injured, it is liable for the loss.—Eckert v. Pennsylvania R. Co., Pa., 60 Atl. Rep. 781.

41. CARRIERS—Presumption of Negligence.—Under the common law an injury to a passenger in consequence of the breaking of appliance of a carrier raised a presumption of negligence.—Southern Ry. Co. v. Cunningham, Ga., 50 S. E. Rep. 979.

42. CHATTEL MORTGAGES—Rights of Parties Under Sale.—An agreement between one conducting a mortgage sale and the mortgagor and his creditor as to the disposition of the funds held not to have affected the rights of the mortgagee.—J. F. Seiberling & Co. v. Porter, Ind., 74 N. E. Rep. 516.

43. COMMERCE—Rules Governing.—Congress has the power to prescribe the rules by which interstate commerce shall be governed.—Barnhard Bros. & Spindler v. Morrison, Tex., 87 S. W. Rep. 876.

44. CONSTITUTIONAL LAW—Corporation as a Citizen of a State.—A corporation is not a citizen of a state, within Const. U. S., art. 4, § 2, securing to citizens of each state the privileges and immunities of the citizens of the several states.—Attorney General v. Electric Storage Battery Co., Mass., 74 N. E. Rep. 467.

45. CONSTITUTIONAL LAW—Establishing Boundaries Between Two Parishes.—The interpretation of a law to establish the boundaries between two parishes is a judicial function.—Parish of Caddo v. Parish of Red River, La., 38 So. Rep. 274.

46. CONTINUANCE—Enforcing Continuance of Trial After Amendment.—In an action for personal injuries, enforcing over defendant's objection, continuance of trial after permitting amendment of complaint on trial, held error.—McDonald v. Holbrook, Cabot & Daly Contracting Co., 93 N. Y. Supp. 920.

47. CONTRACTS—Drunkenness as Grounds for Avoidance.—The fact that one is too much intoxicated to "fully" realize what he is doing does not, in the absence of fraud, invalidate a contract made by him while in that condition.—Nance v. Kemper, Ind., 73 N. E. Rep. 937.

48. CONTRACTS—Restraint of Trade.—Contracts which impose partial restraint on business, which will to any extent repress competition and prejudice the public, will not be enforced.—Charleston Natural Gas Co v. Kanawha Natural Gas, Light & Fuel Co., WVa., 50 S. E. Rep. 876.

49. CONTRACTS—Trust Deed.—A contract concerning a loan secured by trust deed and notes held not such an indivisible one as to preclude the lender from maintaining action on the notes and trust deed.—Less v. English, Ark., 87 S. W. Rep. 447.

50. CONTRACTS—When Construction a Question for Jury.—The construction of a contract which was reduced to writing, but where the writing did not show on its face to what conditions it applied, held, properly submitted to the jury, as a question of fact to be determined on the extrinsic evidence.—Donner v. Alford, U. S. C. C. of App., Third Circuit, 136 Fed. Rep. 750.

51. CORPORATIONS—Interstate Commerce.—A state has the right to prescribe the terms and conditions on which a foreign corporation may do business therein, except to restrict or regulate interstate commerce.—Attorney General v. Electric Storage Battery Co., Mass., 74 N. E. Rep. 467.

52. CORPORATIONS—Personal Liability of Officer for Mismanagement.—The president of a corporation held not personally liable for a loss caused by his mismanagement.—David Reus Permanent Loan & Savings Co. v. Conrad, Md., 60 Atl. Rep. 737.

53. CORPORATIONS—Pleading.—Where the name of a party is stated in the complaint in such words as to im

ply a corporation, such party will be presumed to be a corporation.—Ohio Oil Co. v. Detamore, Ind., 73 N. E. Rep. 906.

54. CORPORATIONS—Seal Importing Authority of Officers.—A corporate seal, attached to a transfer of an indebtedness secured by deed of trust, held sufficient evidence that the person who signed the transfer as president of the corporation was authorized by it to execute the same.—Collier v. Alexander, Ala., 38 So. Rep. 244.

55. COURTS—Duty to Dismiss Action.—Where suit does not involve controversy within jurisdiction of the circuit court, it should, on motion dismiss the same.—Kinney v. Mitchell, U. S. C. C. of App., Third Circuit, 136 Fed. Rep. 773.

56. COURTS—Jurisdiction of Supreme Court.—Supreme court held to have no jurisdiction over an appeal from a judgment reviving a judgment entered against a prosecuting witness for costs.—State v. French, Mo., 87 S. W. Rep. 451.

57. CRIMINAL EVIDENCE—Procuring False Testimony. —The fact that a suitor assists in procuring false testimony, or practicing some other fraud on the court, may be considered by the jury to his disadvantage.—Brown v. State, Ala., 38 So. Rep. 268.

58. CRIMINAL TRIAL — Evidence of Other Crimes. — Where testimony as to a former crime of a similar character was admitted, the court on appeal, in the absence of affirmative showing to the contrary, must assume that it was admitted as falling under some one of the exceptions permitting such admission.—State v. Farrier, La., 38 So. Rep. 460.

59. CRIMINAL TRIAL—Premeditation in Homicide Case. —Trial court may read extracts from opinion of court of appeals on questions of premeditation, deliberation, and criminal intent on trial for murder. — People v. Breen, N. Y., 74 N. E. Rep. 483.

60. CRIMINAL TRIAL—Severance.—Action of the trial court in ragard to a severance between accused and his codefendant held not reviewable.—Perez v. State, Tex., 87 S. W. Rep. 350.

61. DAMAGES — Alleging Permanency of Injuries. — Where a description of injuries sued for did not show that they were necessarily permanent, plaintiff should allege their permanency, in order to recover therefor.—McGregor v. Rhode Island Co., R. I., 60 Atl. Rep. 761.

62. DAMAGES—Loss of Shipment.—In an action against a carrier for loss of a portion of the machinery of plaintiff's cotton gin, whereby the operation of the gin was suspended, instruction that time lost by plaintiff in going to defendant's office to inquire about the shipment might be included in damages, held erroneous.—American Express Co. v. Jennings, Miss., 38 So. Rep. 374.

63. DEEDS—Acknowledgment. — An acknowledgment of a deed by the subscriber as attorney in fact held insufficient to entitle the same to record as a conveyance of the subcriber's undivided interest in the property.—Carolan v. Yoran, 93 N. Y. Supp. 935.

64. DESCENT AND DISTRIBUTION— Wife's Property.— On the death of a wife leaving a husband and brothers and sisters surviving, held, that one-half of her land went to the husband and the other to the brothers and sisters.—Keith v. Keith, Tex., 87 S. W. Rep. 384.

65. DISCOVERY—Special Interrogatories to Agent.—Interrogatories submitted to a party must be answered without evasion, and, when addressed to a corporation, it may and should select an agent who is familiar with the facts to answer the same.—Cleveland, C., C. & St. L. Ry. Co. v. Miller, Ind., 74 N. E. Rep. 509.

66. DISMISSAL AND NONSUIT—Dismissing as to Certain Parties. — Where plaintiff sues several defendants as jointly liable, and some are not liable at all, or cannot be joined in the action, the plaintiff may dismiss as to those who are not parties, under the saving statute of amendments.—Charles Lippincott & Co. v. Behre, Ga., 50 S. E. Rep. 467.

67. DISTRICT AND PROSECUTING ATTORNEY—De Facto Officers.—One who did not perform any of the duties of an assistant county attorney, except to sign a certain information, could not be regarded as a *de facto* officer.—Murrey v. State, Tex., 87 S. W. Rep 349.

68. DIVORCE — Alimony. — Wife can claim alimony, where, in answer to the suit of her husband for divorce, she institutes a reconventional demand for separation from bed and board.—Landreaux v. Landreaux, La., 38 So. Rep. 442.

69. DOMICILE—Temporary Absence.—Where a person had an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes.—Erwin v. Benton, Ky., 87 S. W. Rep. 291.

70. EMINENT DOMAIN—Establishment of Highways.— The jury, in determining the question of damages caused by the establishment of a highway, is not bound to accept the opinions of witnesses in regard to the value of land in dispute and cost of changing and constructing fences, walls, etc. — Heath v. Sheetz, Ind., 74 N. E. Rep. 505.

71. EQUITY—Multifariousness.—Where it is manifest on the face of a bill that it presents two causes of action, the defense of multifariousness can be taken by a general demurrer.—Emmons v. National Mut. Bldg. & Loan Assn., U. S. C. C. of App., Fourth Circuit, 135 Fed. Rep. 689.

72. ESTOPPEL—Acts Creating.—In the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites.—Standard Sanitary Mfg. Co. v. Arrott, U. S. C. C. of App., Third Circuit, 135 Fed. Rep. 750.

73. ESTOPPEL—Mortgage. — A mortgagor, having induced plaintiff to take an assignment of the mortgage, held estopped to defend on the ground that it was obtained by duress.—Langley v. Andrews, Ala., 38 So. Rep. 238.

74. EVIDENCE—Goods Obtained by Fraud.—Evidence held insufficient to sustain a petition for the recovery of goods shipped by the petitioner to the bankrupt, on the ground that they were obtained by means of a false financial statement made by the bankrupt to a commercial agency.—*In re* Rose, U. S. D. C., E. D. Pa., 135 Fed Rep. 888.

75. EVIDENCE—Unauthenticated Letters.—Unauthenticated letters received by a trustee in bankruptcy, purporting to have been written by third persons, held not admissible on the hearing of a contested claim.—*In re* Ladue Tate Mfg. Co., U. S. D. C., W. D. N. Y., 135 Fed. Rep. 910.

76. EXECUTION—Description of Property Levied On.— Where a constable levied on several articles of the same kind described as so many of that kind, a claimant was entitled to similarly describe them.—Goltra v. Tice, N. J., 60 Atl. Rep. 757.

77. EXECUTORS AND ADMINISTRATORS—Accounting.— One cited as legatee to appear at accounting of executor, having defaulted because not knowing of her interest as heir, held entitled to have default opened.—*In re* St. John, 93 N. Y. Supp. 840.

78. EXECUTORS AND ADMINISTRATORS—Bonds.—Under the statute authorizing an executory and residuary legatee to give bond to pay debts, such bond is not rendered invalid by reason of a clause requiring an account. —Probate Court of Central Falls v. Adams, R. I., 60 Atl. Rep. 769.

79. EXECUTORS AND ADMINISTRATORS—What is a Judicial Sale.—A sale of real estate by an administrator under an order and decree of court is a judicial sale.—Pierce v. Vansell, Ind., 74 N. E. Rep. 554.

80. FRAUDULENT CONVEYANCES — Lesion Beyond Moiety.—All creditors have the same right to sue to set a sale for lesion beyond moiety, irrespective of the date of their claims.—Belcher & Creswell v. Johnson, La., 38 So. Rep. 481.

81. GARNISHMENT—Pledged Stock.—Where a garnishee held stock pledged to him by the principal defendant as

security, held, that after sale thereof he should account to the judgment creditor for the money so received, less any claim for which the stock was pledged.—Cooley v. Janes, Kan., 80 Pac. Rep. 596.

81. GAS—Negligent Explosion in House.—The manager of a gas company held negligent in turning off gas from a house at a house valve, instead of the street valve.—Huntington Light & Fuel Co. v. Beaver, Ind., 73 N. E. Rep. 1002.

83. GRAND JURY—Appointing Substitute for State Attorney.—Where a state attorney refuses to discharge his duties, the court has the implied power to appoint some other member of the bar to appear in his stead before the grand jury.—Taylor v. State, Fla., 38 So. Rep. 880.

84. HIGHWAYS—Care Required of Infants.—Girl nine years of age, injured by running into team on public street, held negligent, when judged by the ordinary standard of care shown by children of her age, precluding recovery for injuries.—Young v. Small, Mass., 73 N E. Rep. 1019.

85. HIGHWAYS—Viewers' Report.—Objections to highway viewers' report that it was "insufficient in law" and "not made in accordance with law" held too indefinite.—Sisson v. Carithers, Ind., 73 N. E. Rep. 924.

86. HOMESTEAD — Conveyance by Non Compos Husband.—Where a conveyance of the homestead was executed by the husband when *non compos*, and in fraud of his wife's rights, equity will enjoin ejectment against her and cancel the deed.—Moseley v. Larson, Miss., 38 So. Rep. 284.

87. HOMICIDE—Assault in Sudden Passion.—The length of time that the assaulted party is confined as a result of the wound is material to the issue as to whether or not there was an attempt to kill.—Brown v. State, Ala., 38 So. Rep. 268.

88. HOMICIDE—Instructions.—Where the evidence of state tends to show that accused committed murder, whereas evidence in his behalf sustained his defense of justifiable homicide, it is error to instruct as to voluntary manslaughter.—McBeth v. State, Ga., 50 S. E. Rep. 931.

89. HUSBAND AND WIFE—Community Property.—Where the community is insolvent, the husband and wife cannot complain that they were not made parties to a foreclosure, ordering the sale of a certain plantation to pay the price due by the community.—Luria v. Cote Blanche Co., La., 38 So. Rep. 279.

90. HUSBAND AND WIFE — Right of Wife to Sue for Libel.—Injuries to character and mental suffering resulting from a libelous publication are "personal injuries," within the meaning of Acts La. p. 95, of 1902, No. 68, amendatory of Rev. Civ. Code La. art. 2402, and under such act a wife may sue and recover for a libel affecting herself.—Times-Democrat Pub. Co. v. Mozee, U. S. C. C. of App., Fifth Circuit, 136 Fed. Rep. 761.

91. INJUNCTION—Sale of Corporation's Stock. — In a suit to recover shares of stock in a corporation, injunctive relief against the defendant's disposal of the shares is more readily granted than in the case of ordinary personal property.—Currie v. Jones, N. Car., 50 S. E. Rep. 560.

92. INJUNCTION—Sale of Corporation's Stock.—Where the directors of a corporation, having power to sell, have sold the corporate stock, it is too late for interference by injunction.—Huet v. Piedmont Springs Lumber Co., N. Car., 50 S. E. Rep. 846.

93. INTOXICATING LIQUORS—Dwelling House.—It is not an offense for a person not authorized to sell intoxicating liquors to keep them for his own use in a dwelling house not used in connection with the place of business.—State v. White, Kan., 80 Pac. Rep. 589.

94. JUDGES—Grand Jury Organized by De Facto Judge. Where an indictment was preferred by a grand jury organized by a *de facto* judge at a time when a court could be held, it was valid.—Walker v. State, Ala., 38 So. Rep. 241.

95. JUDGMENT—Res Judicata.—Where judgment in an action involving several issues of fact recites a finding on one issue only, they will be held open to inquiry in future litigation. — Hudson v. Remington Paper Co., Kan., 80 Pac. Rep. 568.

96. JURY—Legality of Panel.—A panel of jurors held legal, though the scrolls containing the names of persons eligible as jurors were destroyed.—State v. Teachey, N. Car., 50 S. E. Rep. 232.

97. JURY—Waiver of Right to Jury Trial.—Where a reference is ordered upon consent, any constitutional right to trial by jury is waived.—Brooklyn Heights R. Co. v. Brooklyn City R. Co., 98 N. Y. Supp. 849.

98. LANDLORD AND TENANT—Enticement of Tenant.—One cannot be convicted of enticing away another's tenant, in the absence of evidence of the enticement, or of subsequent employment, or of knowledge of the existence of the contract with the landlord.—Haney v. State, Miss., 38 So. Rep. 284.

99. LANDLORD AND TENANT—Failure to Furnish Surety for Renewal of Lease.—Where the lessee, whose right to renew depends on furnishing a good surety, has announced his inability to furnish any other than the one which the lessor was justified in rejecting, the lessor is released from his liability.—Piper v. Levy, La., 38 So. Rep. 448.

100. LANDLORD AND TENANT—Lease Signed by Landlord Alone.—Though a lease contains an independent covenant for execution by the lessee, where the parties intended that it should take effect without being signed by the lessee, it is valid.—Braman v. Dodge, Me., 60 Atl. Rep. 799.

101. LIBEL AND SLANDER—Damages.—Where the publisher of a libel is liable to both a criminal prosecution and a civil action, the damages recoverable are only compensatory, and no exemplary damages can be assessed.—White v. Sun Pub. Co., Ind., 73 N. E. Rep. 890.

102. LIFE INSURANCE—Application.—If a life insurance policy contains contradictory terms as to application, the court should lean against that construction which imposes the obligation of a warranty and hold the answers to be representations.—Logan v. Provident Sav. Life Assur. Soc., W. Va., 50 S. E. Rep. 529.

103. LIMITATIONS OF ACTIONS—Repudiation of Trust.—Limitations do not run in favor of a trustee until he repudiates his trust and knowledge thereof is brought home to the beneficiary.—McCarthy v. Woods, Tex., 87 S. W. Rep. 405.

104. LIS PENDENS—Title to Crops on Foreclosure.—Where a foreclosure is commenced and *lis pendens* filed, a subsequent renter of the mortgaged property is not entitled to a crop planted by him and standing on the land on the day of sale.—Tittle v. Kennedy, S. Car., 50 S. E. Rep. 544.

105. MASTER AND SERVANT—Assumed Risk.—The rule that a master must provide a safe place for his servant to work does not apply where the servant is making a dangerous place safe.—Jennings v. Ingle, Ind., 73 N. E. Rep. 945.

106. MASTER AND SERVANT—Contract of Employment.—Where plaintiff was employed for a year, and was discharged without just cause, he is entitled to recover earnings for the remainder of the year.—Woods v. M. A. Shumard & Co., La., 38 So. Rep. 416.

107. MASTER AND SERVANT—Contributory Negligence.—Servant, walking in a dark place which he knew to be obstructed, held guilty of contributory negligence.—Carbury v. Eastern Nut & Bolt Co., R. I., 60 Atl. Rep. 773.

108. MASTER AND SERVANT—Failure to Warn.—An employer who places a boy 16 years old at work near a circular saw is responsible for injuries from his not having received the necessary warning.—Gracia v. C. N. Maestri Furniture Mfg. Co., La., 38 So. Rep. 275.

109. MASTER AND SERVANT — Fellow-Servant. — The servants of a railroad operating its cars on the tracks of another, held not fellow-servants of the employees of the road owning the tracks.—Chicago Terminal Transfer R. Co. v. Vandenburg, Ind., 73 N. E. Rep. 990.

110. MASTER AND SERVANT—Fellow-Servant.—In an action for injuries to a servant by being struck by a telephone pole, plaintiff's foreman, in charge of the work, held not plaintiff's fellow-servant.—Sandquist v. Independent Telephone Co., Wash., 80 Pac. Rep. 539.

111. MASTER AND SERVANT—Injury on Freight Elevators.—In an action for personal injuries received while on a freight elevator, the burden of proving defendant's negligence was on plaintiff.—Hendrix v. Cooleemee Cotton Mills, N. Car., 50 S. E. Rep. 561.

112. MASTER AND SERVANT—Injury to Servant.—In an action for injuries to a servant, whether plaintiff was injured through the negligence of fellow-servants or through assumed risks held questions for the jury.—Wabash R. Co. v. Bhymer, Ill., 73 N. E. Rep. 879.

113. MASTER AND SERVANT—Torts of Servant.—In order to escape liability to a stranger for the acts of a servant, the master must show that the servant had abandoned the duties of his employment.—Barmore v. Vicksburg, S. & P. Ry. Co., Miss., 38 So. Rep. 210.

114. MECHANICS' LIENS—Parties.—Where property has been conveyed, and the grantee in possession has contracted for improvements, a lien cannot be established against the grantor because the deed was not recorded.—Lang v. Adams, Kan., 80 Pac. Rep. 593.

115. MINES AND MINERALS—Rights of Parties Under Respective Leases.—Where an owner of oil land sold a one-fifth interest therein, and afterwards made a lease of the entire premises, the owners of the interest in the land held entitled to a like interest in the oil produced therefrom, less expenses of production.—Martel v. Jennings-Haywood Oil Syndicate, La., 38 So. Rep. 253.

116. MINES AND MINERALS—Royalties.—Where a contract for royalties on ore provided that shipments should be determined by railroad shipping receipts, the burden was on defendant, seeking to discredit such receipts, to explain and justify the variations claimed.—Sharp v. Behr, U. S. C. C., E. D. Pa., 136 Fed. Rep. 795.

117. MORTGAGES—Intervention in Proceedings via Executiva.—One who occupies the status and discloses the interest required by law may intervene, by way of opposition, in a proceeding *via executiva*, though no injunction be prayed for or obtained.—Brugier v. Miller, La., 38 So. Rep. 404.

118. MORTGAGES—Motion to Set Aside Judgment on Foreclosure.—After entry of a decree confirming a foreclosure, the judge cannot set it aside, except on the ground of mistake, inadvertence, surprise, excusable neglect, or irregularity.—Clement v. Ireland, N. Car., 50 S. E. Rep. 570.

119. MUNICIPAL CORPORATIONS—Encroachments on Sidewalk.—City ordinances held not to affect right of city by suit in equity to compel removal of encroachments on its sidewalks.—City of New York v. Knickerbocker Trust Co., 93 N. Y. Supp. 937.

120. MUNICIPAL CORPORATIONS—Negligence in Obstructed Street.—City, which granted a permit to a contractor to obstruct a street, held jointly liable with the contractor for injury to a traveler resulting from a failure to guard the obstruction.—Godfrey v. City of New York, 93 N. Y. Supp. 899.

121. MUNICIPAL CORPORATIONS—Obstruction of Street.—A municipality is not barred of its right to remove an obstruction from its public street by lapse of time and payment of personal taxes on the structure constituting the obstruction.—Town of West Seattle v. West Seattle Land & Improvement Co., Wash., 80 Pac. Rep. 549.

122. MUNICIPAL CORPORATIONS—Unsanitary Conditions of Prison.—City is not liable for injuries caused by negligence on the part of its officers and agents respecting its prison or persons confined therein.—Shaw v. City of Charleston, W. Va., 50 S. E. Rep. 527.

123. NEGLIGENCE—Degree of Care Required of Child Using Streets.—Child, in using public steeet, held required to exercise such a degree of care as is reasonably to be expected of one of her years.—Young v. Small, Mass., 73 N. E. Rep. 1019.

124. NEGLIGENCE—Question for Jury.—Where reasonable persons might conscientiously differ as to negligence or contributory negligence, the questions are for the jury.—Greenawaldt v. Lake Shore & M. S. Ry. Co., Ind., 73 N. E. Rep. 910.

125. NEGLIGENCE—Res Ipsa Loquitur.—The doctrine of *res ipsa loquitur* does not dispense with the requirement that the party who alleges negligence must prove the fact.—Stewart v. Vandeventer Carpet Co., N. Car., 50 S. E. Rep. 562.

126. PARTIES—Privity.—In an action to recover for personal injuries, the right of defendant to call in a warrantor depends on the question of privity *vel non* between such defendant and the person so called in.—Muntz v. Algiers & G. Ry. Co., La., 38 So. Rep 410.

127. PARTNERSHIP—Accounting.—Where an auditor, on an accounting between partners, omits to include an undisputed credit to one of partners, the exception of the latter would be sustained.—Murphey v. Bush, Ga., 50 S. E. Rep. 1004.

128. PARTNERSHIP—Effect of Judgment on Partners Not Served.—The only judgment that can be rendered on a firm debt is against the firm jointly and the partners summoned or appearing, whether the summons is served on all or one or more.—Blythe v. Cordingly, Colo., 80 Pac. Rep. 495.

129. PHYSICIANS AND SURGEONS—Liability of Mother for Services to Her Son.—A mother held liable for the services of a physician, whom she employed to perform an operation on her son, who, though more than 21 years of age, was a member of her family.—Best v. McAuslan, R. I., 60 Atl. Rep. 774.

130. PLEADING—Restraining Use of School Building for Religious Purposes.—In a suit to restrain defendants from using a school building for religious purposes, the sustaining of a demurrer to a paragraph of the answer held not error; the facts alleged being provable under a general denial.—Baggerly v. Lee, Ind., 73 N. E. Rep. 921.

131. PRINCIPAL AND AGENT—Bond and Its Consideration.—A bond given by a bank to the state treasurer for safe-keeping of moneys then on deposit and to be deposited, held binding on the sureties as upon a sufficient consideration.—Kephart v. Buddecke, Colo., 80 Pac. Rep. 501.

132. PUBLIC LANDS—Federal Homestead Laws.—After title to lands of the United States has passed, equity will convert the holder of the legal title into a trustee to the true owner, if in equity and by the laws of congress it ought to have gone to another.—Smith v. Love, Fla., 38 So. Rep. 376.

133. PUBLIC LANDS—Presumption of Regularity as to Land Patent.—It is to be presumed that a United States land patent was regularly issued and that all the preliminary requirements had been complied with.—Demars v. Hickey, Wyo., 80 Pac. Rep. 521.

134. RECEIVERS—Judgment Against Receiver.—A contract exempting property of a corporation in the hands of a receiver for liability for any judgment that might be recovered against the receiver held not to prevent recovery of judgment against him.—Reardon v. White, Tex., 87 S. W. Rep. 365.

135. SALES—Resale by Vendor on Failure to Accept.—Purchaser of goods, after resale by seller, held not entitled to dispute that the price received on the resale was the real value.—McDonald Cotton Co. v. Mayo, Miss., 38 So. Rep. 372.

136. SALES—Measure of Damages.—Loss of customers by a retail dealer in coal is not an element of damage for failure of a wholesaler to deliver coal purchased from him by the retail dealer.—Righter v. Clark, Conn., 60 Atl. Rep. 741.

137. SCHOOLS AND SCHOOL DISTRICTS—Term of Contract with Teacher.—Where plaintiff was engaged as a school teacher at the beginning of the second term of the school year at the rate of the annual salary, it will be presumed that the contract ended with the year.—Denison v. Inhabitants of Vinalhaven, Me., 60 Atl. Rep. 798.

138. SHERIFFS AND CONSTABLES—Wrongful Levy.—In an action against a constable for an alleged wrongful levy, admission of a statement alleged to have been made by complainant to the constable referring to the size of plaintiff's family held error.—Rasco v. Jefferson, Ala., 38 So. Rep. 246.

139. SHIPPING—Damage to Cargo.—A vessel held liable for injury to perishable goods after landing the same on a deck, where, although having no claim against them for freight, she refused to allow their removal by the consignee.—The Alnwick, U. S. D. C., E. D. Wis., 135 Fed. Rep. 884.

140. SHIPPING—Loss of Logs in Loading.—A ship held not liable for loss of mahogany logs delivered alongside for loading in the open sea, where they broke from the rafts before they could be loaded in the exercise of reasonable diligence.—Munson S. S. Line v. E. Steger & Co., U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 772.

141. SHIPPING—Verbal Transfer of Vessel.—Performance of verbal contract to loan credit for a third interest in unfinished vessel held to vest title in such interest.—Misner v. Strong, N. Y., 73 N. E. Rep. 965.

142. STREET RAILROADS—Contributory Negligence of Child.—Where a child of sufficient age is allowed to travel unattended, and is injured by a collision with a street car, it is contributory negligence on his part if he unreasonably runs into the danger.—Murphy v. Boston Elevated Ry. Co., Mass., 73 N. E. Rep. 1018.

143. TAXATION—Safety Deposit Vaults.—Vaults of a safe deposit company, constructed in a building owned by other persons in such a manner as to be real estate, constitute an interest in real property, subject to taxation as such.—People v. Wells, N. Y., 73 N. E. Rep. 961.

144. TOWAGE—Negligence in Loss of Tow.—A tug held liable for loss of a tow on the ground of negligence in starting out, in view of the condition of the weather, with such vessels as composed its tow.—The Ganoga, U. S. C. C. of App., Second Circuit, 135 Fed. Rep. 747.

145. TRADE MARKS AND TRADE NAMES—Infringement.—The infringement of a trade mark implies injury, and where it is of such a character as is calculated to deceive purchasers, the owner is not bound to wait until injury has actually resulted before he can maintain a suit for relief by injunction.—Lanahan v. John Kissell & Son, U. S. C. C., E. D. N. Y., 135 Fed. Rep. 899.

146. TRIAL—Action by Servant for Injuries.—In action by employee for injuries, giving of instruction for authorizing finding for plaintiff under conditions not covered by the negligence charged held reversible error.—St. Louis & N. A. R. Co. v. Midkiff, Ark., 87 S. W. Rep. 446.

147. TRUSTS—Evidence to Establish.—On payment of certain money by a daughter to her father, on his agreement to buy a house, to be hers at his death, evidence held insufficient to establish resulting trust in house subsequently purchased by him.—Leary v. Corwin, N. Y., 73 N. E. Rep. 984.

148. TRUSTS—Parol Evidence.—Resulting trust in real estate, arising from purchase price being paid by one and title being taken in name of another, held excepted from Code 1896, § 1041, so that parol declarations of the parties regarding such trust were admissible.—Long v. Mecham, Ala., 38 So. Rep. 262.

149. TRUSTS—Sufficiency of Evidence to Establish.—A parol trust cannot be impressed upon an apparent grant of the equitable, as well as legal, title, except by clear and certain evidence.—Rogers v. Tompkins, Tex., 87 S. W. Rep. 879.

150. VERDICT—Direction.—Where the court directs a verdict, the usual and better practice is for the jury to return a formal verdict in writing; but the absence of such a verdict is not fatal to the validity of the judgment.—Moore v. Petty, U. S. C. C. of App., Eighth Circuit, 136 Fed. Rep. 668.

151. VENDOR AND PURCHASER—Marketable Title.—A vendee held not bound to accept the title by adverse possession, in the absence of proof that the legal owners of the property were not under disability during the running of the statute.—Carolan v. Yoran, 93 N. Y. Supp. 935.

152. VENUE—Boundaries.—Where the property which is the subject of an action of boundary between two parishes lies within the territorial jurisdiction of the courts of both, such action may be brought in either county.—Parish of Caddo v. Parish of Red River, La., 38 So. Rep. 274.

153. WATERS AND WATER COURSES—Discharge of Surface Water on Adjoining Land.—A mere permissive use by a landowner of the lands of another for the discharge of surface waters does not create an easement therein.—Clay v. Pittsburgh, C., C. & St. L. Ry. Co., Ind., 73 N. E. Rep. 904.

154. WILLS—Burden of Proving Contract to Bequeath Property.—One who seeks to establish a right to the property of a decedent under a contract by the decedent to leave him such property has the burden of establishing such agreement.—Hanly v. Hanly, 93 N. Y. Supp. 864.

155. WILLS—Conditions Against Marriage.—A will devising certain realty to testator's widow so long as she remained unmarried confers on her a fee-simple title, the qualifying terms amounting to a condition against remarriage.—Beatty v. Erwin, Ind., 73 N. E. Rep. 926.

156. WILLS—Contract to Bequeath Property.—Parol agreement by a decedent to leave his property to plaintiff must have the essentials of a contract and be clearly established by disinterested witnesses.—Hanly v. Hanly, 93 N. Y. Supp. 864.

157. WILLS—Election by Widow.—Where a widow elects to accept under her husband's will, the obligation to contribute her proportion of the loss to a legatee, the property devised to whom is taken to pay debts, is imposed on her by Rev. St., § 5973.—Allen v. Tressenrider, Ohio, 73 N. E. Rep. 1015.

158. WILLS—Words Creating Trust.—A will devising and bequeathing property to the testator's wife, and expressing the "wish and expectation" that, in making her will, she would generously remember the children of a deceased brother, held not to create a trust in favor of such children.—Russell v. United States Trust Co. of New York, U. S. C. C. of App., Second Circuit, 136 Fed. Rep. 758.

159. WITNESSES—Impeachment.—A witness may have acted badly in matters not germane to the suit, and yet his testimony may be considered as true.—Conner v. Pozo, La., 38 So. Rep. 454.

160. WITNESSES—Impeachment.—A party is entitled to impeach the testimony of a witness by proof of his declarations out of court inconsistent with his testimony as to material matters.—Villineuve v. Manchester St. Ry., N. H., 60 Atl. Rep. 748.

161. WITNESSES—Incriminating Evidence.—Where a witness refuses to answer on the ground that it would criminate him, his claim of privilege must be respected, unless he is clearly mistaken or his refusal is purely contumacious.—Wilson v. Ohio Farmers' Ins. Co., Ind., 73 N. E. Rep. 892.

162. WITNESSES—Objection to Evidence.—That a witness was not a member of an association does not render him incompetent to testify as to what he actually heard and saw at an election of its officers.—State v. Farrier, La., 38 So. Rep. 460.

163. WITNESSES—Transactions with Decedents.—The statute against a party testifying to transactions with testator held to prohibit it only as against his heirs and legal representatives, and not as against his legatees and devisees.—Emerson v. Scott, Tex., 87 S. W. Rep. 369.

164. WORK AND LABOR—Form of Action to Recover for Services.—The proper form of action to recover the value of services under contract which plaintiff has been prevented from performing by the default of defendant is *indebitatus assumpsit*.—Poland v. Thomaston Face & Ornamental Brick Co., Me., 60 Atl. Rep. 795.